

***United States Court of Appeals
for the Second Circuit***



APPENDIX

Count

76-6009

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MARCELINA DIAZ RIVERA DE GOMEZ,

Appellant-Plaintiff,

- v -

HENRY A. KISSINGER, Secretary of
State of the United States, et al.,

Appellees-Defendants.

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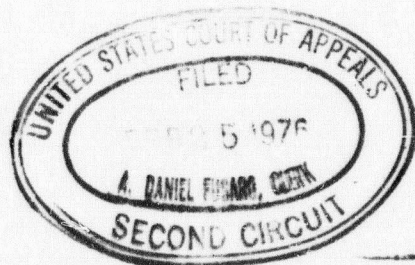
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Appeal No.

76- 6009

APPENDIX TO APPELLANT'S BRIEF



ANTONIO C. MARTINEZ
Attorney for Appellant
324 West 14th Street
New York, N.Y. 10014
989-0404

FEBRUARY, 1976

PAGINATION AS IN ORIGINAL COPY

LIST OF THE PARTS OF THE
RECORD CONTAINED HEREIN

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Appellant-Plaintiff,

- v -

HENRY A. KISSINGER, Secretary of
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Appellees-Defendants.

Appeal No.

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APPENDIX TO APPELLANT'S BRIEF

Complaint, filed May 10, 1974

Plaintiff, by her attorney, complaining of the
defendants, alleges for her complaint.

1. Plaintiff, MARCELINA DIAZ RIVERA DE GOMEZ,
is a citizen of the United States by birth, presently
residing at 432 East 139th Street, Bronx, New York 10454.
Exhibit 1 is a copy of plaintiff's birth certificate.

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2. This is an action

(a) For a declaratory judgment, 28 U.S.C. Sec. 2201 et seq. to declare that plaintiff has been lawfully married to CECILIO TRIFILIO GOMEZ-TEJADA, who was born on February 22, 1946. Exhibit 2 is a copy the marriage certificate and translation thereof.

(b) Jurisdiction is predicated on 8 U.S.C. Sec. 1329, Sec. 279 of the Immigration and Nationality Act of 1952.

3. In addition, or in the alternative, this is an action in the nature of mandamus to compel the performance of a duty owed to plaintiff, 28 U.S.C. Sec. 1361.

4. Defendant, HENRY A. KISSINGER, is Secretary of State of the United States and is charged with the administration and enforcement of all immigration and nationality laws relating to

(a) the powers, duties and functions of diplomatic and consular officers of the United States

(b) the duties and function of the Bureau of Security and Consular Affairs and

(c) is directly responsible for the administration of the immigration and nationality laws by consular officers.

5. Defendant, JOHN R. DIGGINS, is Director of the Visa Office of the Department of State of the United States and is responsible for reviewing the action of consular officers on visa applications,

6. Defendant, CATHERINE M. HURLEY, is Consul of the United States at Santo Domingo, Dominican Republic and is responsible at that consular post, for the issuance of visas to applicants therefor.

7. Defendant, SOL MARKS, is District Director of the Immigration and Naturalization Service at New York, New York.

8. (a) On January 31, 1973 defendant SOL MARKS has approved a "relative immigration visa petition" filed by plaintiff for the benefit of her husband CECILIO TRIFILIO GOMEZ. Exhibit 4. Such approval constitutes a "license" granted to plaintiff by defendant SOL MARKS pursuant to the Administrative Procedure Act.

(b) Defendant MARKS did forward such "license" to defendant HURLEY.

9. (a) On December 17, 1973, the defendant, CATHERINE M. HURLEY, has submitted to the Immigration and Naturalization Service at New York, for "investigation", the application for an Immigrant visa of plaintiff's husband. Exhibit 3.

(b) No further action on said visa application has been taken by defendant, CATHERINE M. HURLEY.

(c) No further action has been taken by defendant SOL MARKS on the defendant's HURLEY request for an investigation of the marriage between plaintiff and CECILIO TRIFILIO GOMEZ.

10. (a) Defendant HURLEY'S failure to process the immigration visa application of plaintiff's husband, despite the license issued by defendant MARKS, is arbitrary, capricious and unreasonable.

(b) Defendant, CATHERINE M. HURLEY, is disregarding the Immigration and Nationality Act and the Congressional mandate for the reunification of families by creating her own standards as to presumptions of law.

WHEREFORE, plaintiff demands:

A. Judgment declaring the plaintiff's marriage to CECILIO TRIFILIO GOMEZ is present, valid and effective.

B. Judgment enjoining defendant, CATHERINE M. HURLEY, from denying an immigrant visa application to plaintiff's husband CECILIO TRIFILIO GOMEZ on the ground that her marriage to plaintiff is not present, valid and effective.

C. Judgment directing the defendant, CATHERINE M. HURLEY, to process the immigrant visa application of CECILIO TRIFILIO GOMEZ on the basis of his marriage to plaintiff.

D. Judgment requiring defendant, SOL MARKS to apply the common law rules of Evidence of the Court.

E. Judgment requiring defendant, CATHERINE M. HURLEY to apply the common law rules of Evidence of the Court.

F. Judgment enjoining the defendant SOL MARKS from applying negative presumptions of law.

G. Judgment enjoining the defendant CATHERINE M.

HURLEY from applying negative presumptions of law.

H. Judgment setting forth standards to be used by the District Director in evaluating the marriage.

I. Judgment setting forth standards to be used by the United States Consul Catherine M. Hurley, in evaluating the marriage.

J. Judgment for such other and further relief as to the Court may seem just and proper.

CERTIFICADO DE ACTA DE NACIMIENTO
Certificate of Birth Registration

Certifico que en la Sección de Nacimientos del Registro
a mi cargo aparece la siguiente inscripción:

I certify that in the Section of Births of the Registry
under my custody the following birth is registered:

Libro Núm. Volume No.	42	Folio Núm. Folio No.	XXX	Acta Núm. Certificate No.	528	Municipio donde ocurrió el nacimiento Municipality where birth occurred	Humacao, P.R.
Fecha de Inscripción Date of Registration	1ro. diciembre	1924	Fecha de nacimiento Date of Birth	24 agosto	1924		
Nombre del Inscrito Name of Person Registered		Marcelina Díaz Rivera				Sexo (sex): <input type="checkbox"/> Varón (male) <input checked="" type="checkbox"/> Hembra (female)	
Nombre del Padre Name of Father		Salustiano Díaz		Natural de Birthplace	Humacao	Estado o País (State or Country)	
Nombre de la Madre Name of Mother		Miguelina Rivera		Natural de Birthplace	Humacao	Estado o País (State or Country)	

DATOS SOBRE EL SOLICITANTE
Information on Applicant

Solicitante:
Applicant
Ventura Díaz

Si veterano, licenciamiento honorable Núm.:
If veteran, honorable discharge Number

Dirección:
Address
Urb. MariOlga Calle San Joaquín #23, Caguas, P.R.

Si para uso oficial de una Agencia del Gobierno Estatal o Federal:
If for official use of an agency of the Commonwealth of Puerto Rico or of the Federal Government

Nombre de la Agencia:
Name of Agency

Dirección:
Address

ADVERTENCIA

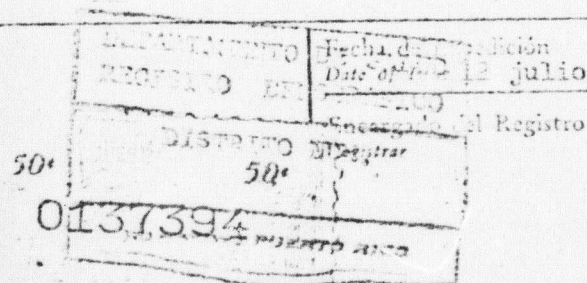
Este certificado no será válido si en el mismo no se ha estampado el sello oficial del Registro Demográfico correspondiente. También se requiere la cancelación de un sello de rentas internas de 50¢, según exige la ley, excepto en aquellos casos en que el certificado se expida para uso exclusivo de un veterano o de una agencia de gobierno del Estado Libre Asociado de Puerto Rico o de los Estados Unidos de América. LA MERA POSESION DE ESTE DOCUMENTO NO DEBE CONSTITUIR BASE PARA IDENTIFICAR AL PORTADOR COMO LA PERSONA A QUIEN CORRESPONDE LA INSCRIPCION.

WARNING

This certificate is void if the official seal of the corresponding Demographic Registry Office has not been stamped hereon. Also, a 50¢ internal revenue stamp is required by law to be cancelled hereon, unless this certificate is issued for the exclusive use of a veteran or for the official use of any Agency of the Commonwealth of Puerto Rico or of the Federal Government of the United States. THE MERE POSSESSION OF THIS DOCUMENT DOES NOT CONSTITUTE EVIDENCE FOR IDENTIFYING THE BEARER AS THE PERSON TO WHOM THE REGISTRATION REFERS.

ESTE CERTIFICADO NO SERA VALIDO SI EN EL MISMO APARECEN TACHADURAS, BORRADURAS O ALTERACIONES.

This certificate is void if there are any alterations or erasures on same.



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Sonia Delgado de Torres

Nombre en maquinilla o letra de molde
Typed Name

Firma
Signature

Sonia Delgado de Torres
EXHIBIT 1

(Round Rubber Stamp)

Dominican Republic
CENTRAL ELECTRAL JUNTA

No. 787

Office of the Civil State

Extract of a Certificate of Marriage

ALFREDO A. ANDREU MARTINEZ, Clerk of the Civil State of the Sixth Circumscription of the National District, Dominican Republic, CERTIFY, That in the archives under my charge, there appears an entry of a registered marriage under No. 166 Liber 14 Folio 66, which extract sets forth as follows:- That on the 31st of July, 1972 a civil marriage was contracted, solemnized by the undersigned, messrs. CECILIO TRIFILIO GOMEZ TEJADA, 26 years of age engaged in private employment, of Dominican Nationality, residing at Hortensia Street, #4, Las Flores, City, bearer of identification stamp No. 12598, series 40 son of Aguedo Gomez and Casilda Tejada, residing at La Jaiba, Luperon, D.R. MARCELINA DIAZ RIVERA 47 years of age, social worker, Puerto Rican Nationality, residing at 176 Stanton Street, New York City, N.Y. U.S.A. bearer of passport No. C-1915586, daughter of Salustiano Diaz, deceased and Miguela Rivera, residing at Humacao, Puerto Rico.

Witnesses: Apolinar Diaz Collado and Pascasio Tavera, of this domicile and residence, Dominicans over the age of 21 years.

This certification is issued at the request of the party interested in the City of Santo Domingo, D.N. Dominican Republic, this 31st day of August, 1972.

(Round Rubber Stamp)

Signature Illegible

Clerk of the Civil State

Int. Rev. Stamps

Green # 3234162 - \$1.00

Blue Stamp - 485869 - 50¢

TRANSLATION OF EXHIBIT 2



EMBASSY OF THE
UNITED STATES OF AMERICA
Consular Section
Santo Domingo, Dominican Republic
December 17, 1973;

Mr. Antonio C. Martinez
Santo Domingo, R. D.

Re: Cecilio Trifilio Gomez Tejada

Dear Sir :

The receipt is acknowledge of your recent letter which is returned herewith for your ready reference.

Mr. Gomez' case has been submitted to the Immigration and Naturalization Service at New York with a request for an investigation. As soon as a reply is received, further action will be taken in this case.

Very truly yours,

C. H. Hurley:can
Consul of the United States of
America

(We are not keeping any record of this correspondence. Should you write again, please return this letter and the attachment hereto.)

SDO
C-1 10/69

EXHIBIT 3

-9a-

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

New York, New York

NOTICE OF APPROVAL OF RELATIVE IMMIGRANT VISA PETITION

NAME AND ADDRESS OF PETITIONER

Marcelina Diaz de Gomez
122 Norfolk Street, Apt. 4
New York, New York 10002

NAME OF BENEFICIARY

Cecilio T. Gomez Tejada

CLASSIFICATION FILE NO.

201 (b) A19 550 431

DATE PETITION
FILED

DATE OF APPROVAL
OF PETITION

9/18/72

1/31/73

Your petition has been approved and is valid for the duration of your present relationship to the beneficiary.

Please be advised that approval of the petition confers upon the beneficiary an appropriate classification. The approval constitutes no assurance that the beneficiary will be found eligible for visa issuance, admission to the United States or adjustment to lawful permanent resident status. Eligibility for visa issuance is determined only when application therefor is made to a consular officer; eligibility for admission or adjustment is determined only when application therefor is made to an immigration officer. Also, please note the items below which are indicated by "X" marks concerning this petition:

1. ☒ YOUR PETITION TO CLASSIFY THE BENEFICIARY AS AN IMMEDIATE RELATIVE OF A UNITED STATES CITIZEN HAS BEEN FORWARDED TO THE UNITED STATES CONSULATE AT Santo Domingo, D.R. THIS COMPLETES ALL ACTION BY THIS SERVICE ON THE PETITION. THE UNITED STATES CONSULATE, WHICH IS UNDER THE SUPERVISION OF THE DEPARTMENT OF STATE, WILL ADVISE THE BENEFICIARY CONCERNING VISA ISSUANCE. Inquiry concerning visa issuance should be addressed to the Consul. This Service will be unable to answer any inquiry concerning visa issuance.
2. ☐ IF YOU BECOME NATURALIZED AS A CITIZEN OF THE UNITED STATES AND AN IMMIGRANT VISA HAS NOT YET BEEN ISSUED TO THE BENEFICIARY, NOTIFY THIS OFFICE IMMEDIATELY, GIVING THE DATE OF YOUR NATURALIZATION. AT THE SAME TIME, IF THE PETITION WAS IN BEHALF OF YOUR SON OR DAUGHTER, ALSO ADVISE WHETHER THAT PERSON IS STILL UNMARRIED. THIS INFORMATION MAY EXPEDITE THE ISSUANCE OF A VISA TO THE BENEFICIARY.
3. ☐ YOUR PETITION FOR PREFERENCE CLASSIFICATION, AS SHOWN ABOVE, HAS BEEN FORWARDED TO THE UNITED STATES CONSULATE AT _____. THIS COMPLETES ALL ACTION BY THIS SERVICE ON THE PETITION. THIS SERVICE HAS NOTHING TO DO WITH THE ACTUAL ISSUANCE OF VISAS. VISAS ARE ISSUED ONLY BY UNITED STATES CONSULS WHO ARE UNDER THE JURISDICTION OF THE U.S. DEPARTMENT OF STATE. UNDER THE LAW ONLY A LIMITED NUMBER OF VISAS MAY BE ISSUED BY THAT DEPARTMENT DURING EACH YEAR AND THEY MUST BE ISSUED STRICTLY IN THE CHRONOLOGICAL ORDER IN WHICH PETITIONS WERE FILED FOR THE SAME CLASSIFICATION. WHEN THE BENEFICIARY'S TURN IS REACHED ON THE VISA WAITING LIST, THE UNITED STATES CONSUL WILL INFORM HIM AND CONSIDER ISSUANCE OF THE VISA. Inquiry concerning visa issuance should be addressed to the Consul. This Service will be unable to answer any inquiry concerning visa issuance.
4. ☐ THE PETITION STATES THAT THE BENEFICIARY IS IN THE UNITED STATES AND WILL APPLY TO BECOME A LAWFUL PERMANENT RESIDENT. THE ENCLOSED APPLICATION FOR THIS PURPOSE (FORM I-435) SHOULD BE COMPLETED AND SUBMITTED BY THE BENEFICIARY IN ACCORDANCE WITH THE INSTRUCTIONS CONTAINED THEREIN. IF THE BENEFICIARY HAD PREVIOUSLY SUBMITTED FORM I-425 WHICH WAS RETURNED TO HIM, HE SHOULD RESUBMIT THAT FORM.
5. ☐ THE BENEFICIARY WILL BE INFORMED OF THE DECISION MADE ON HIS PENDING APPLICATION TO BECOME A LAWFUL PERMANENT RESIDENT (FORM I-489).
6. ☐ THE PETITION STATES THAT THE BENEFICIARY IS IN THE UNITED STATES AND WILL APPLY TO BECOME A LAWFUL PERMANENT RESIDENT. HOWEVER, AN IMMIGRANT VISA NUMBER IS NOT PRESENTLY AVAILABLE, THEREFORE, THE BENEFICIARY MAY NOT APPLY TO BECOME A PERMANENT RESIDENT.
7. ☐ SINCE THE BENEFICIARY IS A NATIVE OF THE WESTERN HEMISPHERE, HE IS INELIGIBLE TO BECOME A LAWFUL PERMANENT RESIDENT OTHER THAN BY DEPARTING FROM THE UNITED STATES AND REENTERING IN POSSESSION OF AN IMMIGRANT VISA ISSUED BY AN AMERICAN CONSUL.
8. ☐ DOCUMENTS WHICH YOU SUBMITTED IN SUPPORT OF YOUR PETITION HAVE SERVED OUR PURPOSE AND ARE RETURNED.
9. ☐ REMARKS:

EXHIBIT 4

BEST COPY AVAILABLE

VERY TRULY YOURS,

Sol Markes
DISTRICT DIRECTOR

Defendants' Answer to the Complaint filed
September 18, 1974

Defendants, Henry A. Kissinger, John R. Diggins, Catherine H. Hurley, and Sol Marks, by their Attorney, Paul J. Curran, United States Attorney for the Southern District of New York, as their answer to the complaint herein, respectfully allege as follows:

1. Neither admit nor deny the allegations contained in paragraphs 2 and 3 of the complaint since they state conclusions of law.
2. Admit the allegations contained in paragraphs 6 and 7 of the complaint.
3. Deny knowledge or information to form a belief as to the truth of the allegations in paragraph 1 of the complaint.
4. Deny each and every allegation in paragraphs 4, 5, 8, 9 and 10 of the complaint.

FIRST AFFIRMATIVE DEFENSE

5. This Court lacks subject matter jurisdiction.

SECOND AFFIRMATIVE DEFENSE

6. The complaint fails to state a claim upon which relief may be granted.

WHEREFORE, defendants demand judgment dismissing the complaint herein with costs and disbursements of the action, and for such other and further relief as this Court may deem just and proper.

Plaintiff's Notice to take deposition
upon oral examination of defendant Catherine
M. Hurley and Request for the production of
documents by said defendants, filed September
24, 1974.

Please take notice that, pursuant to F.R.Civ.P. 30(a), plaintiff, by her attorney, will take the testimony by deposition upon oral examination of defendant CATHERINE M. HURLEY, consul of the United States at Santo Domingo, Dominican Republic at 10:00 A.M. on October 22, 1974 at the offices of the American Embassy, Santo Domingo, Dominican Republic.

Pursuant to F.R. Civ.P. 30(b)(5), plaintiff requests that the following documents be produced by the said defendant at the taking of the deposition:

1. The refusal worksheet Form FS-290-A and the immigrant visa control card FS-499 relating to the denial of an immigrant visa to plaintiff's husband, CECILIO TRIFILIO GOMEZ-TEJADA.
2. All writings (letters, reports, office memorandums) or copies thereof pertaining to the immigrant visa case of CECILIO TRIFILIO GOMEZ-TEJADA, sent to or received from the Immigration and Naturalization Service.

3. All investigative reports from the Consular investigative staff of the American Embassy at Santo Domingo, Dominican Republic pertaining to the immigrant visa case of CECILIO TRIFILIO GOMEZ-TEJADA.

4. All writings (letters, reports office memorandum, instructions) or copies thereof pertaining to the immigrant visa case of CECILIO TRIFILIO GOMEZ-TEJADA and sent to or received from the Department of State.

Memorandum and Order granting defendants'
Motion for the taking of depositions, (Brieant, J.)
filed January 16, 1975.

Motion granted. Notice vacated and discovery against the United States Consul is stayed, without prejudice to apply on notice in this action for such discovery as may be reasonably necessary in the action after a final administrative determination has in fact been made.

Any such discovery shall be limited to matters which are material and relevant, and not conceded or stipulated. Such discovery shall be mutual.

So ordered.

Defendants' Affidavit, Rule 9(g) statement
and Notice of Motion for Summary Judgment,
filed November 11, 1975.

PLEASE TAKE NOTICE that upon the annexed affidavit and Rule 9(g) statement of Mary P. Maguire, Special Assistant United States Attorney for the Southern District of New York, and upon all papers filed in proceedings had herein, the undersigned will move this Court on the 25th day of November, 1975 at 9:30 A.M. for an order pursuant

to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment for the defendants and for such other and further relief as this Court may deem just and proper.

DEFENDANTS' RULE 9(a) STATEMENT

Defendants by their attorney, Paul J. Curran, United States Attorney for the Southern District of New York, submit this statement of facts pursuant to Rule 9(g) of the General Rules of the Southern District of New York, and contend that as to the following material facts there is no genuine issue to be tried.

1. Plaintiff, Marcelina Diaz Rivera de Gomez (hereinafter "Mrs. Gomez") is a fifty-one year old United States citizen, who was born in Puerto Rico on August 24, 1924. On July 26, 1972 plaintiff travelled to Santo Domingo in the Dominican Republic for a two week vacation trip. Plaintiff states that shortly after her arrival in Santo Domingo, on July 30, 1972, she was introduced to Cecilio Trifilio Gomez-Tejada (hereinafter "Gomez-Tejada"), a then twenty-five year old native and citizen of the Dominican Republic. The next day, despite a twenty-one years age difference, plaintiff and Gomez-Tejada were married. On August 10, 1972 plaintiff returned to the United States.

2. Gomez-Tejada had previously been married to one Juana Francisca Fernandez, also a native and citizen of the Dominican Republic, by whom had had two children, Maria Francisca and Bernard Rovin, born January 3, 1968 and February 11, 1971, respectively. He divorced Juana Fernandez prior to marrying plaintiff. A few weeks after such marriage, and on the basis of it, Mrs. Gomez filed a petition with the New York District of the Immigration and Naturalization Service (the "Service") on September 18, 1972, to accord Gomez-Tejada the status of an immediate relative pursuant to Section 201(b) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1151(b).

3. The Service approved her petition on January 31, 1973 and forwarded the approved petition to the American Consulate in Santo Domingo, Dominican Republic. Thereafter, Gomez-Tejada submitted a formal application for an immigrant visa.

4. Based on facts uncovered during an investigation conducted in the Dominican Republic to determine Gomez-Tejada's eligibility for an immigrant visa, the Consul had reason to believe that the marriage between plaintiff and Gomez-Tejada was a marriage of convenience

entered into solely for the purpose of circumventing the immigration laws. Consequently, pursuant to the authority contained in 22 C.F.R. 42.43(a), the Consul returned the approved visa petition to the Service in New York on June 11, 1974 for a determination as to whether the approval of the visa petition should be revoked pursuant to 8 C.F.R. 205.2.

5. An investigation was then undertaken by the Service in New York in view of the facts uncovered by the consulate in the Dominican Republic. Mrs. Gomez was invited to appear for an interview regarding her marital status and was confronted with the results of the investigation conducted by the consul. She appeared on July 24, 1974 but declined, on advice of counsel, to make any statement other than to advise the Service of her new address and telephone number. Subsequently, on January 3, 1975 the plaintiff was served with a notice of intent to revoke the Service's approval of the petition (Exhibit A attached hereto). The notice detailed the grounds for the revocation action and granted Mrs. Gomez a period of fifteen days within which to offer evidence in oppositions

to the revocation action. On January 10, 1975 Mrs. Gomez submitted a statement of Gomez-Tejada in which he alleged that the affidavit of Juana Fernandez was obtained under duress (Exhibit B attached hereto). On February 26, 1975 the Service revoked its approval of the visa petition filed by Mrs. Gomez on behalf of Gomez-Tejada (Exhibit C attached hereto).

6. Plaintiff appealed the decision of the Service to revoke the approval of the visa petition to the Board of Immigration Appeals. By decision and order dated July 8, 1975 the Board dismissed the appeal and found that the marriage between plaintiff and Gomez-Tejada was entered into solely to obtain immigration benefits and was not bona fide within the contemplation of the immigration laws (Exhibit D attached hereto).

7. On May 10, 1974 Mrs. Gomez, by her attorney, commenced this action to compel the consul to issue a visa to her husband. The complaint alleges (1) that plaintiff is seeking a declaratory judgment that she is lawfully married to Gomez-Tejada and (2) in the alternative, that the action is one in the nature of mandamus to

compel to consul to issue a visa to plaintiff's husband.
the defendants now move for summary judgment.

Affidavits in Support of Motion
for Summary Judgment

MARY P. MAGUIRE, being duly sworn, deposes and
says:

1. I am a Special Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, attorney for the defendants, and as such I am in charge of and familiar with this action. This affidavit is based in part on information contained in the official records of the United States of America, i.e., official records of the Department of State and of the Immigration and Naturalization Service. I submit this affidavit in support of the defendants' motion for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment to the defendants.

2. Plaintiff, Marcelina Diaz Rivera de Gomez (hereinafter "Mrs. Gomez") is a fifty-one year old United States citizen, who was born in Puerto Rico on August 24, 1924. On July 26, 1972 plaintiff travelled to Santo

Domingo in the Dominican Republic for two-week vacation trip. Plaintiff states that shortly after her arrival in Santo Domingo, on July 30, 1972, she was introduced to Cecilio Trifilio Gomez-Tejada (hereinafter "Gomez-Tejada"), a then twenty-five year old native and citizen of the Dominican Republic. The next day, despite a twenty-one years age difference, plaintiff and Gomez-Tejada were married. On August 10, 1972 plaintiff returned to the United States.

3. Gomez-Tejada had previously been married to one Juana Francisca Fernandez, also a native and citizen of the Dominican Republic, by whom he had two children, Maria Francisca and Bernard Rovin, born January 3, 1968 and February 11, 1971, respectively. He divorced Juana Fernandez prior to marrying plaintiff. A few weeks after such marriage, and on the basis of it, Mrs. Gomez filed a petition with the New York District of the Immigration and Naturalization Service (the "Service") on September 18, 1972, to accord Gomez-Tejada the status of an immediate relative pursuant to Section 201(b) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1151(b).

4. The Service approved her petition on January 31, 1973 and forwarded the approved petition to the American Consulate in Santo Domingo, Dominican Republic. Thereafter, Gomez-Tejada submitted a formal application for an immigrant visa.

5. Following the filing of his visa application consular officials in Santo Domingo made repeated attempts to contact Gomez-Tejada. However, it was discovered that he did not reside at the address given on the visa application. It was subsequently learned, on June 8, 1974, that not only was Gomez-Tejada continuing to reside with his ex-wife, Juana Fernandez, and their children, but that he had had a third child by her. The child was born on September 2, 1973, more than a year after his ceremonial marriage to plaintiff. Juana Francisca Fernandez executed a sworn statement attesting to these facts and the town mayor also confirmed these facts.

6. Based on these facts, the Consul had reason to believe that the marriage between plaintiff and Gomez-Tejada was a marriage of convenience entered into solely for the purpose of circumventing the immigration laws. Section 212(a)(19) of the Immigration and Nationality Act,

8 U.S.C. §1182(a)(19) and 22 C.F.R. 42.91(19) provides that an alien who seeks to procure a visa or other documentation for entry into the United States by fraud or by wilfully misrepresenting a material fact shall be ineligible to receive a visa.

7. 22 C.F.R. 42.43(a) specifically authorizes a consular officer who knows or has reason to believe that the approval of the visa petition by the Service was obtained by fraud or misrepresentation or that the beneficiary is not entitled, for any other reason, to the status approved, to return the case to the Service for reconsideration. Accordingly, on June 11, 1974 the visa petition was returned to the Service in New York for a determination as to whether the previously approved visa petition should be revoked pursuant to C.F.R. 205.2.

8. An investigation was then undertaken by the Service in New York in view of the facts uncovered by the Consulate in the Dominican Republic. Mrs. Gomez was invited to appear for an interview regarding her marital status. She appeared on July 24, 1974 and was confronted with the results of the investigation conducted by the

consul, but declined, on advice of counsel, to make any statement other than to advise the Service of her new address and telephone number. Subsequently, on January 3, 1975 the plaintiff was served with a notice of intent to revoke the Service's approval of the petition (Exhibit A attached hereto). The notice detailed the grounds for the revocation action and granted Mrs. Gomez a period of fifteen days within which to offer evidence in opposition to the revocation action. On January 10, 1975 Mrs. Gomez submitted a statement of Gomez-Tejada in which he alleged that the affidavit of Juana Fernandez was obtained under duress (Exhibit B attached hereto). On February 26, 1975 the Service revoked its approval of the visa petition filed by Mrs. Gomez on behalf of Gomez-Tejada (Exhibit C attached hereto).

9. Plaintiff appealed the decision of the Service to revoke the approval of the visa petition to the Board of Immigration Appeals. By decision and order dated July 8, 1975 the Board dismissed the appeal and found that the marriage between plaintiff and Gomez-Tejada was entered into solely to obtain immigration benefits and was not bona fide within the contemplation of the immigration laws (Exhibit D attached hereto).

10. On May 10, 1974 Mrs. Gomez, by her attorney, commenced this action to compel the consul to issue a visa to her husband. The complaint alleges, inter alia, (1) that plaintiff is seeking a declaratory judgment that she is lawfully married to Gomez-Tejada and (2) in the alternative, that the action is one in the nature of mandamus to compel the consul to issue a visa to plaintiff's husband.

11. The defendants now move for summary judgment on the complaint in that plaintiff has failed to state a cause of action upon which relief can be granted and for lack of jurisdiction. In this respect the defendants respectfully submit: (a) that the decision of the Consul to issue or deny a visa to plaintiff's spouse is not subject to judicial review; (b) plaintiff lacks standing to use; and (c) mandamus does not lie against a consul with respect to visa issuance.

WHEREFORE, it is prayed that summary judgment be granted to the defendants and the underlying complaint be dismissed.

Plaintiff's Rule 9(g) Counter-Statement

1. The revocation action with respect to the approved petition was arbitrary, capricious and violative of the most elementary rules of due process of law. Plaintiff was called upon to rebut in New York statements allegedly obtained by Consular investigators in Santo Domingo, Dominican Republic.

No opportunity was afforded plaintiff to examine the witnesses who allegedly gave their statements to Consular investigators.

2. The procedures used by the American Consul at Santo Domingo and those employed by the Immigration and Naturalization Service at New York in this case did not provide for an evidentiary hearing in this controversy as to whether or not plaintiff's marriage to Gomez-Tejada had been entered into solely to obtain immigration benefits.

The defendants have resisted discovery which alone would have enabled plaintiff, through her attorney, to examine the witnesses against her husband.

3. This case is not ripe for summary judgment because of the many unresolved issues of material fact.

Memorandum and Order granting defendants'
Motion for Summary Judgment and dismissing
the action, filed December 1, 1975.

Motion for Summary Judgment granted and
action dismissed. This Court lacks jurisdiction to
review the acts of American consular officials abroad
in determining whether or not to issue a visa.
Kleindienst v. Mandel, 408 US 753, 762 (1972); U.S. ex
rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir.), cert.
denied sub. nom. U.S. ex rel. Ulrich v. Stimson, 279 U.S.
868 (1929).

So Ordered.

Plaintiff's Notice of Appeal
filed January 5, 1975.

Notice is hereby given that plaintiff Marcelina Diaz Rivera de Gomez hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment entered December 5, 1975 upon Judge Brieant's order granting defendants' motion for summary judgment dismissing this action.

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Mom *us* *J. Cabell*
UNITED STATES ATTORNEY

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